

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

76-7267

United States Court of Appeals FOR THE SECOND CIRCUIT

NORMANDY MANUFACTURING CORP., L. CLAUSE,
S.A., COMPAGNIE D'ASSURANCES LA NEUCHA-
TELOISE, S.A., HANSSEN AND CO., JAGENBERG
OF CANADA, BILTMORE HATS, LTD., P.I.E.
TRANSPORT, INSURANCE COMPANY OF NORTH
AMERICA, COMPAGNIE D'ASSURANCES LA PAT-
ERNELLE, THE AMERICAN IMPORT COMPANY,
SOCIETE DE PRODUITS CHIMIQUES INDUS-
TRIELS, et al.,

Plaintiffs-Appellants,

v.

ATLANTIC CONTAINER LINE LTD., and CIE GEN-
ERALE TRANSATLANTIQUE, SWEDISH AMERI-
CAN LINES and WALLENIOUS LINES, d/b/a Care
Line,

Defendants-Appellees.

PETITION FOR REHEARING WITH A SUGGESTION FOR REHEARING EN BANC

HILL, RIVKINS, CAREY, LOESBERG
& O'BRIEN

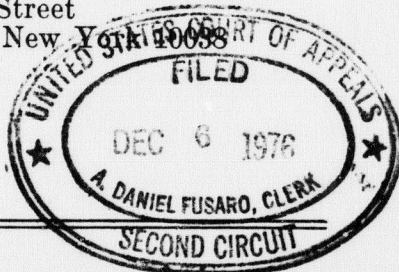
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United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 76-7267

NORMANDY MANUFACTURING CORP., L. CLAUSE, S.A., COMPAGNIE D'ASSURANCES LA NEUCHATELOISE, S.A., HANSEN AND CO., JAGENBERG OF CANADA, BILTMORE HATS, LTD., P.I.E. TRANSPORT, INSURANCE COMPANY OF NORTH AMERICA, COMPAGNIE D'ASSURANCES LA PATERNELLE, THE AMERICAN IMPORT COMPANY, SOCIETE DE PRODUITS CHIMIQUES INDUSTRIELS, et al.,

Plaintiffs-Appellants,

v.

ATLANTIC CONTAINER LINE LTD., and CIE GENERALE TRANS-ATLANTIQUE, SWEDISH AMERICAN LINES and WALLENIOUS LINES, d/b/a Care Line,

Defendants-Appellees.

PETITION FOR REHEARING WITH A SUGGESTION FOR REHEARING EN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT:

I

It seems to be in vogue in certain circles to blame the Courts and the judicial system for a climate of irresponsibility and disregard for the rights of others. This is not to say that it is likely that the decision by the Panel in

¹ This case was argued on November 22, 1976 and decided on November 24, 1976.

this case will result in a measurable increase in marine disasters involving fire and explosion on board ships at sea.

Nevertheless if the decision of the Panel on this case is to become the law of this Circuit, the financially capable and responsible steamship carriers will be able to avoid the consequences of their negligent managing agents. Injured persons will be relegated for their remedy to the questionable recourse available to them against the carrier instrumentalities under foreign law in a foreign place just as the Panel in this case has relegated appellants in this matter to Hamburg, Germany to sue Care Line.

The summary judgment awarded by the District Court dismissing appellants' claims for \$859,650.00, affirmed by the Panel that heard this matter did far more than accomplish the speedy resolution of another admiralty case found on the docket of this Court.

Historically, the Second Circuit has been a leader in fostering the concept of accountability. It could hardly be expected to support the proposition that the negligence of one's managing agents is imputed to the carrier so as to vitiate the fire defense, but should those managing agents delegate to others their duty of watchfulness, the negligence of such delegatee would not cost the carrier the immunity of the Fire Statute.

But this is precisely the blueprint that has been laid out by the Panel in this case in holding the steamship carrier, ACL² immunized by the fire defense [46 U.S.C.

² Atlantic Container Line Limited (ACL) is a partnership of six corporations including Cie Generale Transatlantique, Swedish American Lines and Wallenius Lines. These three formed a joint venture doing business under the name of Care Line and while CGT is a general agent for ACL it is also part of the group to whom ACL delegated its obligations under a memorandum of understanding (A62/A87). All defendants-appellees are represented by the same counsel.

1304 (2) (b)] with a lack of "privity and knowledge". Specifically, the Panel said "The negligence of Capt. Rene Goby acting as cargo coordinator for Care, may not be imputed to ACL for purposes of the 'Fire Statute'".

Goby was a managerial level employee of CGT listed as a general agent for the carrier ACL on ACL's bills of lading issued to appellants. This alone is sufficient to impute the negligence of Capt. Goby to ACL so as to defeat the Fire Statute under the 9th Circuit decision in *Wilbur et al. v. Williams S.S. Co.*, 9 F. 2d 940 (N. D. Cal. 1925), 9 F. 2d 622,³ under the 4th Circuit decision in *United States v. Charbonnier*, 45 F. 2d 174 (4th Circuit 1930); and more recently in *Gesellschaft Fur Getreidehandel A.G., Et Al., Hugo Mathes & Schurr KG. v. SS TEXAS, etc.* (E.D. La. 1970), 318 F. Supp. 599.

Over and above this agency relationship, ACL testified that where one of their agents was going to book cargo of a hazardous nature under an ACL bill of lading to go on a Care Line operated vessel ACL always took the position that the matter be referred "to Capt. Goby in LeHavre being the Care Line coordinator and it was up to him to advise whether he could accept . . . Capt. Goby in LeHavre was performing the function for Care Line vessels of determining the handling of hazardous cargoes or incompatible hazardous cargoes on Care Line vessels in the same manner or in the same type of responsibility as . . . exercised in connection with ACL vessels . . ." (A43).

The Panel was troubled by the concept of imputation of fault considering the relationship of the appellees to involve an additional delegation. Judge Learned Hand saw no problem in this when in *Great Atlantic and Pacific Tea Co. v. Lloyd Brasileiro*, 159 F. 2d 661, he wrote out of the

³ The negligence of Goby was identical to that in this case. In the words of the 9th Circuit: "The Court below found that the method of stowage followed in this case was known and acquiesced in by the General Agent of the [carrier] * * *".

law of this Circuit insulation from the negligence of sub-agents where a carrier delegated to its general agent who delegated to its traffic manager (Zumsteg) who in turn designated a port engineer (Borges) whose negligence caused the loss.

The Panel in this case is in effect overturning this long standing precedent and bringing into the law of the Second Circuit a device which on implementation by steamship carriers through the creation of intervening agencies will constitute a write-off of accountability for prudence in preventing conditions that precede marine disasters such as befell the MONT LAURIER.

Judge Hand wrote "while it is seldom if ever that one situation exactly matches with another, we have frequently decided that the negligence of persons no nearer the actual governing officials than Borges should be imputed to corporate owners."

If the Panel is going to change the law of this Circuit with regard to accountability of carriers for the acts of their managing agents designee with the resulting horrendous effect that such a change will have on life and property, and considering the attitude in the other circuits that corresponds to the previously existing attitude in the Second Circuit, it is suggested that this is a matter that should be reconsidered en banc.

II

While it would not otherwise be a matter for en banc consideration, the Panel affirmed relegating appellants to Hamburg to seek a remedy directly against the carrier's managing agents for negligence in spite of the fact that this negligent managing agent was expressly made a party to the bill of lading and the bill of lading included a forum selection clause providing for jurisdiction in the Southern District of New York. The basis for the Court denying

appellants the forum that Care Line agreed to in the bill of lading is not stated nor can it be discerned from a reading of Point II of appellees' brief and Point II of appellants' reply brief.

This Court has respected the rights of the parties to a contract to be bound to litigate their dispute in foreign jurisdictions because they agreed to it since *M/S Bremen and Unterweser Rederei G.M.B.H. v. Zapata Off-Shore Company*, 407 U.S. 1, 92 S. Ct. 1907. It is amazing to the European appellants that the position of the Second Circuit is that where contracts are made in Europe calling for litigation of disputes in the Southern District of New York our Courts will nevertheless send the parties to Europe; and when contracts were made with a forum selection clause for Europe Judge Knapp sent the parties to try their action in Europe in *Sanko S.S. Co., Ltd. v. Newfoundland Refining Co. Ltd.*, 411 F. Supp. 285 (S.D.N.Y. 1976).

WHEREFORE, upon the foregoing grounds it is respectfully urged that this petition for re-hearing be granted and that the Court suggest an answer to the petition on the part of appellee on the two points and upon re-hearing en banc that the judgment of the District Court be, upon further consideration, reversed.

Respectfully submitted,

HILL, RIVKINS, CAREY, LOESBERG
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Attorneys for Plaintiffs-Appellants

MARTIN B. MULROY
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NORMANDY MANUFACTURING CORP.,
et al.,

Plaintiffs-Appellants,

against

ATLANTIC CONTAINER LINE LTD.,
et al.,

Defendants-Appellees.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes
and says that he is over the age of 18 years. That on the 6th
day of December, 1976, he served two copies of
Petition for Rehearing on
Haight, Gardner, Poor & Havens, Esqs., the attorneys
for Defendants-Appellees
by delivering to and leaving same with a proper person in charge of
their office at One State Street Plaza
in the Borough of Manhattan, City of New York, between
the usual business hours of said day.

David F. Wilson

Sworn to before me this
6th day of December, 1976.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978